IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1817

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellants,

against

C.D.R. ENTERPRISES, LTD., FELIX J. GLORO, CHARLES D'ALEO and DANIEL OLIVO,

Appellees.

BERNARD J. LAKRITZ, as Director of the Bureau of Maintenance and Operation of the Division of School Buildings of the Board of Education of the City of New York; WILLIAM GLEESON, as Civil Engineer in the Office of Maintenance and Operation of the Division of School Buildings of the Board of Education of the City of New York; HUGH J. McLAREN, Jr., as Executive Director of the Division of School Buildings of the Board of Education of the City of New York; JOSEPH A. KRATONI, as Executive Director of the Division of Business and Administration of the Board of Education of the City of New York; IRVING ANKER, as Chancellor of the Board of Education of the City of New York; THE BOARD OF EDUCATION OF THE CITY OF NEW YORK; JOHN T. CARROLL, as Director of Construction of the City of New York; HARRISON J. GOLDIN, as Comptroller of the City of New York; LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York; LOUIS J. LEVINE, as Industrial Commissioner of the State of New York; and HUGH L. CAREY, as Governor of the State of New York,

Appellants,

against

ULYSEUS C. PAINTING & G.C. CORP.; LACONIA PAINTING CORP.; STRATOS CONTRACTING CORP.; ASTORIA PAINTING CO., INC.; HELLAS CONTRACTING CORP.,

Appellees.

On Appeal From the United States District Court
For the Eastern District of New York

MOTION TO DISMISS OR AFFIRM WITH SUPPORTING BRIEF

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Printinghouse Press – Bar Ass'n Steno Serv. (Appeals Section) 212-687-0384

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On Appeal From the United States District Court
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MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss the appeal herein on the grounds hereinafter set forth, or to affirm the judgment sought to be reviewed on the appeal on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

New York, N.Y., Nov. 18, 1976

MORRIS WEISSBERG
Attorney for Appellees
C.D.R. Enterprises, Ltd., Felix J. Gloro, Charles D'Aleo and Daniel Olivo

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

The appellant's Jurisdictional Statement presented for decision questions whether a statute which gives to resident citizens a preference in employment by contractors upon New York State's public works thereby denies to resident aliens the equal protection of the laws; and whether it opposes any federal policy or plan regulating immigration and naturalization.

By giving to resident citizens a preference in employment by contractors upon public works, the statute excludes resident aliens from such employment, solely on the ground that they are aliens; and thereby it denies to resident aliens the equal protection of the laws.

Such exclusion of aliens from employment on public works can not be justified by calling it a preference in employment given by the statute to resident citizens, because the statute accomplishes the preference in employment which it gives to resident citizens by excluding from employment resident aliens.

Since the statute thus excludes resident aliens from employment on public works solely on the ground that they are aliens, its constitutionality can be sustained only by showing that such exclusion is necessary to carry out some overriding State purpose which could not otherwise be accomplished.

The appellant's Jurisdictional Statement made no attempt to show that the statute's exclusion of aliens from employment on public works was necessary to carry out some overriding State purpose which could not otherwise be accomplished.

Instead, the appellant argued only that exclusion of aliens from employment on public works is reasonably related to the legitimate State interest of reducing unemployment among resident citizens.

We submit that the constitutionality of the statutory exclusion of aliens from employment on public works is not sustained by showing that its purpose or effect is to reduce unemployment

among resident citizens. The economic effects of unemployment apply no less to resident aliens than to resident citizens; and resident aliens participate along with resident citizens in economic activities and share the burdens of all the residents of the State, including the statutory obligation to pay taxes, and to serve in the armed forces in time of war; and it was so decided in *Sugarman v. Dougall,* 413 U.S. 634 (1972).

A. Section 222 of the New York Labor Law denies to resident aliens the equal protection of the laws by excluding them from employment on public works.

Section 222 of the New York Labor Law, in part, provides:

> "In the construction of public works *** preference in employment shall be given to citizens of the state of New York who have been residents of the state for at least twelve consecutive months immediately prior to the commencement of their new employment."

While section 222 also provides that:

> "Persons other than citizens of the state of New York or residents of such SMSA may be employed when such citizens or residents are not available",

the effect of the above-quoted statutory provisions is to classify aliens solely on the basis of their alienage, so as to exclude them from employment on public works when resident citizens are available therefor, and to allow them to be employed on public works only when resident citizens are not available therefor.

The above-quoted statutory classification of aliens as ineligible for employment on public works solely on the ground that they are aliens, unconstitutionally denies to them the equal protection of the laws. *Sugarman v. Dougall,* 413 U.S. 634 (1972); *Hampton v. Mow Sun Wong,* 96 S.Ct. 1895 (1976); *Civil Service Commission v. Ramos,* 96 S.Ct. 2616 (1976).

The appellant argued in his Jurisdictional Statement (pp. 10; 11), that the statute did not classify aliens solely on the basis

of their alienage, because it also excluded from employment on public works citizens who did not reside within the State of New York, and citizens with less than twelve months of residence within the State of New York.

On this record it is not necessary to decide whether the statute constitutionally excludes from employment on public works nonresident citizens and new resident citizens, because no such individuals are parties in this case in which the record presents no such question.

The statute excludes such citizens from employment on public works on the basis of their nonresidence or insufficient residence within the State of New York, and not on the basis of alienage.

Therefore, the statutory exclusion of some citizens from employment on public works for lack of the prescribed twelve months of residence within the State of New York is different from its exclusion of resident aliens from employment on public works solely on the ground that they are aliens.

Appellant also argued in his Jurisdictional Statement (p. 14) that section 222 of the New York Labor Law:

> "does not involve the foreclosure of an entire occupational field as did the public employment limitation in *Sugarman.*"

But section 53 of New York's Civil Service Law, which was held unconstitutional in *Sugarman v. Dougall, supra,* contained a provision similar to the provision in section 222 of the New York Labor Law, that aliens may be employed when qualified citizens are not available for employment.

In *Truax v. Raich,* 239 U.S. 33, 42 (1915), a similar argument was rejected because it presented no valid reason for a statutory reduction of the eligibility of resident aliens for employment. The Court said that the State can not:

> "treat the employment of aliens as in itself a peril requiring restraint regardless of kind or class of work".

B. Exclusion of resident aliens from employment on public works is not necessary to carry out some overriding State purpose which could not otherwise be accomplished; and it is not reasonably related to any valid State purpose, including reduction of unemployment among resident citizens.

The appellant's Jurisdictional Statement said (p. 11):

> "the traditional, reasonable relation test continues to be applicable to classifications consisting exclusively of aliens so long as the benefit withheld does not affect a fundamental constitutional or economic interest possessed by aliens."

But the right to work for a living is a fundamental right, as well as an economic necessity.

In *Truax v. Raich, supra,* 239 U.S. 33, 41, 43 (1915), the Court said that a State statute can not constitutionally deny to a lawfully admitted resident alien "the right to work for a living in the common occupations of the community"; that "No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment"; and that, consequently, "discrimination against aliens as such in competition with citizens *** clearly falls under the condemnation of the fundamental law."

In *Hampton v. Mow Sun Wong, supra,* 96 S.Ct. 1895, 1911-1912 (1976), this Court said:

> "The impact of the rule on the millions of lawfully admitted resident aliens is precisely the same as the aggregate impact of comparable state rules which were invalidated by our decision in *Sugarman.* By broadly denying this class substantial opportunities for employment, the Civil Service Commission rule deprives its members of an aspect of liberty. *** We hold that §338.101(a) of the Civil Service Commission Regulations has deprived these respondents of liberty without due process of law and is therefore invalid."

The appellant's Jurisdictional Statement also said (p. 11):

> "there is no constitutional right to employment on public works, *Crane v. New York,* 239 U.S. 195 (1915); *Heim v. McCall,* 239 U.S. 175 (1915)."

But even without a constitutional right to be employed by the government, a resident alien nevertheless has a constitutional right not to be excluded from eligibility for such employment by a statute which unconstitutionally denies to resident aliens the equal protection of the laws.

In *Slochower v. Board of Higher Education,* 350 U.S. 551, 555 (1956), the Court said:

> "To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful and non discriminatory terms laid down by the proper authorities."

In *Wieman v. Updegraff,* 344 U.S. 183, 192 (1952), the Court said:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

In *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 185 (1951), a concurring opinion by Mr. Justice Jackson stated:

> "The fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally."

Crane v. New York, supra, 239 U.S. 195 (1915), and *Heim v. McCall, supra,* 239 U.S. 175 (1915) – cited by the appellant – were, in effect, overruled in *Sugarman v. Dougall, supra,* 413 U.S. 644-645 (1972). See, also: *Takahashi v. Fish & Game Comm.* 334 U.S. 410 (1948).

Crane v. New York, supra, sustained the constitutionality of the predecessor of section 222 of the New York Labor Law based on the special-public-interest doctrine that employment on public works is a privilege which a State may constitutionally reserve for its citizens, and that the State may exclude aliens therefrom. That doctrine was held inapplicable to resident aliens in *Graham v. Richardson,* 403 U.S. 365, 374 (1971), and in the *Sugarman* case, *supra,* 413 U.S. 634 (1972).

There is no constitutionally significant difference between the statutory exclusion of resident aliens from eligibility for employment in New York's competitive civil service, which was held unconstitutional in the *Sugarman* case, *supra,* and the statute in this case which excludes resident aliens from eligibility for employment on New York's public works.

In *Truax v. Raich, supra,* 239 U.S. 33, 41 (1915) – decided at the same term as the *Crane* and *Heim* cases, *supra* – the Court decided that a statute entitled:

> "An act to protect the citizens of the United States in their employment against non-citizens of the United States, in Arizona",

unconstitutionally denied to resident aliens the equal protection of the laws. The Court said:

> "It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood."

The appellant's Jurisdictional Statement did not base any argument on the new provisions in section 222 of the New York Labor Law that local residents within "a statistical metropolitan sampling area (SMSA)" shall have preference in employment on public works therein, whenever the unemployment rate therein:

> "is determined by the federal Labor Board Bureau of Labor Statistics to be six per centum or more for a period of three consecutive months ***."

Such new statutory provisions do not significantly add any constitutional support to the statutory provisions which give to resident citizens a preference in employment on public works, by excluding resident aliens from eligibility for employment thereon, solely on the ground that they are aliens.

CONCLUSION

For the foregoing reasons, we submit that the questions on which this cause depends are so unsubstantial as not to need further argument; and that, consequently, the appellees' motion to dismiss or affirm should be granted.

November 18, 1976.

Respectfully submitted,

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